MAJLIS AMANAH RA'AYAT v. OFFICIAL RECEIVER, MALAYSIA

[F.C. (Salleh Abas C.J. (Malaya), Abdul Hamid & Abdoolcader F.JJ.) January 23 & February 4, 1984]

[Ipoh – Federal Court Civil Appeal No. 210 of 1982]

Company Law – Winding up – Company insolvent – Effective date for purposes of proof of debt – Whether date of order for winding up of Company or that of commencement of the winding up – Bankruptcy Act, 1967, s. 40(3) – Companies Act, 1965, ss. 219(2) & 291(1).

In this case a Company incorporated under the Companies Act, 1965 was ordered to be wound up and the respondent was appointed provisional liquidator thereof by an order of court made on July 22, 1976 in a petition presented by a creditor on November 14, 1975. The respondent was subsequently appointed liquidator of the Company by order made on March 7, 1977. By virtue of the provisions of section 219(2) of the Companies Act the winding up was deemed to have commenced at the time of the presentation of the petition, that is, November 14, 1975. The appellant in response to the notice issued by the respondent lodged a proof of debt for a sum of over two million dollars allegedly incurred as a result of an agreement it had entered with the Company and two other parties on November 19, 1975 and a supplemental agreement of the same date and the execution of letters of guarantee and performance bonds by it between June 10, 1975 and November 19, 1975. The respondent rejected the appellant's claim on the basis that the debt had been incurred after the commencement of the winding up on November 14, 1975 and that there was no evidence to substantiate the fact that the agreement of November 19, 1975 had taken effect. The appellant appealed to the High Court. Annuar J. held that the debts were incurred after the commencement of the winding up of the Company as the moneys claimed were in fact paid on February 14 and December 20, 1977 and he dismissed the appeal. The appellant appealed to the Federal Court.

Held: the effective date for the purposes of proof of debt against an insolvent Company which is being wound up is the date of the order of winding up, that is, in this case, July 22, 1976 and therefore the appellant's proof of debt was wrongly rejected by the respondent. An order should be made that the appellant's proof of debt be admitted.

Cases referred to

(1) *In re Daintrey, Ex parte Mant* [1900] 1 Q.B. 546
(2) *In re Northern Counties of England Fire Insurance Company, Macfarlane's Claim* (1881) 17 Ch. D. 337
(3) *In re Law Car and General Insurance Corporation* [1913] 2 Ch. 103
(4) *Re Pullins of Newcastle Pty. Ltd.* (1966) 85 W.N. (N.S.W.) 16, 22-23

FEDERAL COURT.

S. E. Rajah (*Kevin Danker* with him) for the appellant.

Puan Zaleha Yusof, Federal Counsel, for the respondent.

Cur. Adv. Vult.

Abdoolcader F.J. (delivering the Judgment of the Court): A short, swift and simple solution to the point in issue in these proceedings was regrettably occluted by the manner in which the basic issue arising for determination was presented, discussed and considered before the matter came before us. It is not necessary for the purposes of this judgment to set out the facts of the case at any length as the issue involved is primarily one of law pertaining to the winding up by order of court of Ismail Mahyuddin Enterprise Sdn. Bhd. ('the Company'), a company incorporated under the Companies Act, 1965. The Company was ordered to be wound up and the respondent was appointed provisional liquidator thereof by an order of court made on July 22, 1976 on a petition presented by a creditor on November 14, 1975. The respondent was subsequently appointed liquidator of the Company by an order made on March 7, 1977. By virtue of the provisions of section 219(2) of the Companies Act the winding up was deemed to have commenced at the time of the presentation of the petition therefor, namely, November 14, 1975.

The appellant, in response to a notice dated October 28, 1976 issued by the respondent to creditors of the Company to prove their debts, lodged with the respondent a proof of debt for a sum of over two million dollars allegedly incurred as a result of an agreement it had entered into with the Company and two other parties on November 19, 1975 and a supplemental agreement of the same date and the execution of certain letters of guarantee and performance bonds by it between June 10, 1975 and November 19, 1975. The respondent, however, by a notice dated April 20, 1982 rejected the appellant's claim on the basis that the debt had been incurred after the commencement of the winding up on November 14, 1975 and that there was no evidence to substantiate the fact that the agreement of November 19, 1975 had taken effect. The appellant appealed to the High Court against this decision primarily on the ground that the debt or liability had in fact been incurred before the commencement of the winding up by negotiations which took place in early October 1975 culminating in agreement between the parties at a meeting held on November 4, 1975 and that the agreement of November 19, 1975 and the related documents were merely

a formalisation of the agreement arrived at previously between the parties which was before the commencement of the winding up on November 14, 1975. Anuar, J., holding that the debts were incurred after the commencement of the winding up of the Company as the moneys claimed were in fact paid on February 14 and December 20, 1977 upheld the respondent's decision and dismissed the appeal on July 12, 1982. The appellant then brought this further appeal before this court.

The fallacy, as we see it, in the consideration hitherto of the propriety and legal tenability of the appellant's claim lies in the determination of the effective date for the purposes of the proof of debt, *scilicet*, whether it is the date of the order for the winding up of the Company or that of the commencement of the winding up. That is the nub of the matter before us and we should perhaps digress to mention that, on the factual aspect, Mr. Rajah for the appellant had to concede when we put it to him that there was insufficient evidence on record to substantiate the appellant's contention that the debt or liability in question was in fact incurred before the commencement of the winding up on November 14, 1975. To revert to the matter of the effective date, section 291(1) of the Companies Act, in so far as it is material for present purposes, provides that in every winding up, subject in the case of insolvent companies to the application in accordance with the provisions of the Act of the law relating to bankruptcy in force for the time being in the States of Malaya, all debts payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages shall be admissible to proof against the company. As the Company is insolvent, the provisions of section 40(3) of the Bankruptcy Act, 1967 which would accordingly apply stipulate that save as provided in sub-sections (1) and (2) (which are not relevant in this case), all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

For the purposes of the Bankruptcy Act the effective date for debts provable in bankruptcy is the date of the receiving order, but when the provisions of section 40(3) of the Bankruptcy Act are applied to an insolvent company by virtue of section 291(1) of the Companies Act the question arises in the case of a winding up by the court as to whether the effective date in relation thereto is that of the winding up order of the court or of the commencement of the winding up under section 219(2) of the Companies Act. We would refer to two indicia in this regard which we consider significant. First, section 40(3) of the Bankruptcy Act which is referentially made applicable by section 291(1) of the Companies Act specifically refers to the date of the receiving order and not that of the act of bankruptcy (cf. *In re Daintrey, Ex parte Mant*[1]). And second, the prescribed form of proof of debt requires a proving creditor to affirm *inter alia* that the named company was at the date of the order for winding up, and specifically stating that date, justly and truly indebted to it in the sum mentioned and still is.

The decision in *In re Northern Counties of England Fire Insurance Company, Macfarlane's Claim*[2] is useful and pertinent to the issue involved in the appeal before us. It was held in that case that the holder of a fire policy issued by a fire insurance company is entitled, upon the company being ordered to be wound up, to prove in the winding up a claim on account of a fire which had occurred after the presentation of the petition but before the order to wind up; Jessel, M.R., said in this respect (at page 342) that the point was not arguable and the claim was clearly provable. In *In Re Law Car And General Insurance Corporation*[3] Cozens-Hardy, M.R., said (at pages 118-119) in relation to the English statutory equivalent to section 291(1) of the Companies Act that it was clear that the date of the winding up order, and not the commencement of the winding up, is the critical date for the purpose of that provision, and Kennedy, L.J., held (at page 135) to the same effect. The whole question has been appropriately and exhaustively dealt with by Street, J., on the Equity side in the New South Wales Supreme Court in *Re Pullins of Newcastle Pty. Ltd.*[4] (at pages 22-23) where he held that where a company is being wound up by order of the court, the date as at which claims are to be estimated is the date of the winding up order and not the date of commencement of the winding up, following and applying *In re Law Car And General Insurance Corporation (supra).*

It is clear therefore that the effective date for the purposes of determining the debt or liability of an insolvent company in liquidation by order of court is the date of the order for winding up.

The effective date in the matter before us would accordingly be July 22, 1976 and the appellant's proof of debt was therefore wrongly rejected by the respondent.

We accordingly at the conclusion of argument before us allowed the appeal with costs here and below, set aside the order of the learned Judge, made an order in terms of the appellant's motion of May 10, 1982 that its proof of debt be admitted and directed the deposit in court to be paid out to the appellant.

Appeal allowed.

Solicitors: *Zain & Co.*

TARA RAJARATNAM v. DATUK JAGINDAR SINGH & ORS.

[O.C.J. (Abdul Razak J.) November 21, 1982]
[Johore Bahru – Civil Suit No. 284 of 1979]

Damages – Breach of contract, undue influence, breach of trust and fraud – Measure of damages – Joint and several liability of defendants – Contracts Act, 1950, ss. 74(1) & 183.

Fraud – Damages – Restitution of land no longer possible.

In this case the learned trial judge had found the first and second defendants liable for breach of contract, undue influence, breach of trust and fraud. The third defendant was found to be liable for fraud only in conjunction with the first and second defendants – see [1983] 2 M.L.J. 127. The learned trial judge dealt with the question of damages in a separate judgment. An appeal from this judgment was dismissed by the Federal Court – see [1983] 2 M.L.J. 196.

Held: (1) there could be no restitution of the land to the plaintiff as the said land was no longer in the hands of the defendant and therefore only damages could be awarded instead;

(2) in contract, the measure of damages is the market value of the benefit which the plaintiff had been deprived through the breach. In fraud the measure of damages is an award which serves to put the plaintiff in the position he would have been if the representation had not been made to him;

(3) in this case it is sufficient for the purpose of awarding the damages to consider them only on the basis of fraud because the award could be the highest attainable and would necessarily cover the claims for breach of contract and breach of trust as well;

(4) taking into account the value of the land in July 1975 and allowing for the increase in the price of the land from July 1975 to July 1982, the date of the judgment and the value of the house, the damages would be awarded in the sum of $972,624.00;

(5) in the circumstances the plaintiff's claim for exemplary damages would be disallowed;

(6) as the monies paid as consideration for the purchase of the said land were paid pursuant to and arising out of fraud they are not recoverable and credit could not be given for them;

(7) the second defendant had never disclosed that he was acting for the first defendant, his principal and under section 183 of the Contracts Act, he is in the event presumed to be personally liable on the contract;

(8) the first defendant was present when the second defendant acted as his agent to commit fraud on the plaintiff which thus makes him liable jointly with the second defendant;

(9) the first, second and third defendants were jointly and severally liable for the tort of deceit, but the first and second defendants were jointly and severally liable for breach of contract. Judgment would therefore be given for the sum of $973,000 as general damages to the plaintiff, with costs and interest.

[*Editorial Note:* The defendants appealed from the decision of the Federal Court to the Privy Council on both liability and quantum. The appeal is pending.]

Cases referred to:

(1) *Doyle* v. *Olby* [1969] 2 Q.B. 158.
(2) *Pribu* v. *The Secretary of State* 135 I.C. 183.
(3) *Palaniappa Chettiar* v. *Arunasalam Chettiar* [1962] A.C. 294; [1962] M.L.J. 143.
(4) *Broome* v. *Cassell & Co* [1972] A.C. 1027, 1076.
(5) *Mafo* v. *Adams* [1969] 3 All E.R. 1404, C.A.
(6) *Rookes* v. *Barnard* [1964] A.C. 1129.
(7) *Drane* v. *Evangelou & Ors.* [1978] 1 W.L.R. 455.
(8) *Barber* v. *Pigden* [1937] 1 K.B. 664.

CIVIL SUIT.

H.E. Cashin (*Subra Naicker* with him) for the plaintiff.

Chin Yew Meng for the 1st and 2nd defendants.

Ronald Khoo for the 3rd defendant.

Cur. Adv. Vult.

Abdul Razak J.: I shall now deal with the question of damages. The plaintiff's claim is as already stated for breach of contract, undue influence, breach of trust and fraud. In my judgment I had found the 1st. and 2nd. defendants in breach in respect of each separate cause of action. The 3rd. defendant was found to be liable for fraud only in conjunction with the 1st. and the 2nd. defendants. In so far as the claim for undue influence and breach of trust were concerned the remedy is in equity for restitution if the subject matter was still *in specie* or for an account of the proceeds from its disposal. There is no doubt that the subject property in its original state had ceased to exist since it